UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

MAXONYMOUS, *Plaintiff* **-against-** The UNITED STATES OF AMERICA *Defendant*	**Case No.** 5:23-CV-0018A/QWT **Before** Qwerty, Chief Judge

OPINION AND ORDER ON MOTION FOR PRELIMINARY INJUNCTION

The plaintiff appeared *pro se*.

Jonofdoom, Esq., United States Attorney General, appeared for the defendant.

Before QWERTY, Chief Judge, U.S. District Court for the District of Columbia:

I. Background

The motion for a preliminary injunction with which we are concerned today arises out of a pair of congressional resolutions, by the House of Representatives and Senate respectively (denominated a "joint resolution", see *infra*). The resolution(s) allege generally that plaintiff demonstrates "a total disregard for congress [sic], its committees and its authority" and appears to have appended to its joint resolution a screenshot of speech in which the plaintiff states that "we are seceding from the fed gov [sic]". At 23:29 UTC on Sunday 8th October 2023, the National Archives and Records Administration

certified the resolution as an "active Senate Resolution"[1]. We note briefly that with a view to preventing circuit splits and promote the coherent rendering of justice, we transferred *sua sponte*, with the parties' mutual consent, the venue to the District of Columbia for further disposition. See 28 U.S.C. § 1404.

II. The *Virginia Petroleum* standard

"The traditional goal of a preliminary injunction is to preserve [the] *status quo*", namely "the last uncontested status which preceded the pending controversy" *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 733 (D.C. Cir. 2022) (quoting *District 50, United Mine v. Int'l*, 412 F.2d 165, 168 (D.C. Cir. 1969)) (cleaned up). This circuit's modern preliminary-injunction standard, as comprehensively formulated in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), was crafted to do just that, is nowadays over 65 years, and remains in vigorous health. See notably *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

As the parties will be very well aware, for a preliminary injunction to issue, "a moving party to make a clear showing that (1) it has a likelihood of success on the merits, (2) the balance of equities [sometimes also called "harm to the nonmovant" in this Circuit] favors preliminary relief, (3) an injunction is in the public interest, and (4) it will likely suffer irreparable harm before the district court can resolve the merits of the case." *Singh v. Berger*, 56 F.4th 88, 95 (D.C. Cir. 2022). "The four factors have typically been evaluated on a "sliding scale."" *Davis v. Pension Benefit Guaranty Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009) (quoting *Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 361 (D.C. Cir. 1999) (we gloss over in doing so several subtleties

[1] https://trello.com/c/m7g4csYD/133-sjr-1-to-bar-maxonymous-from-holding-office

which urgency precludes consideration of). Under this approach, we may "sometimes awar[d] relief based on a lower likelihood of harm when the likelihood of success is very high" *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 51 (2008). The final point which we find salient to raise is that the four-part test is in fact a tripartite one, since "[t]he public interest and balance of equities factors merge when, as here, the government is the opposing party" *In re NTE Conn., LLC*, 26 F.4th 980, 992 (D.C. Cir. 2022).

We begin with analysis of the question of irreparable harm. "[O]ur court [of appeals] has explained [that], "a prospective violation of a constitutional right constitutes irreparable injury for ... purposes" of "seeking equitable relief."" *Karem v. Trump*, 960 F.3d 656, 667 (D.C. Cir. 2020). We cannot forget of course that "the degree of proof required for "irreparable harm" is "high," and that a failure to surmount it provides "grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief" *Olu-Cole ex rel. M.K. v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d 519, 529 (D.C. Cir. 2019). We are nevertheless satisfied that the plaintiff makes a *prima facie* showing on this ground – in declaring that the plaintiff participated in an "insurrection", the resolution proclaims to have the effect of "barr[ing] [plaintiff] from holding office". In doing so, we do not doubt that, were plaintiff to succeed on the merits, there would exist "immediate or ongoing harm from the [government's] alleged constitutional defects" *In re Al-Nashiri*, 791 F.3d 71, 80 (D.C. Cir. 2015), the effect of which is not contested by the Attorney-General before us. The plaintiff is according to his pleadings currently a member of a state legislature, that of Colorado. Whilst we have consistently held that mere loss of pay is not *ipso facto* irreparable, "there can be no do over and no redress" *League of Women Voters of*

U.S. v. Newby, 838 F.3d 1, 9 (D.C. Cir. 2016) (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)) for votes the plaintiff would not cast, speeches he would not have made or elections he would not have stood in. The court, as a matter of pure practicality, would not be in a position to redress any of these matters at the full merits stage.

Before we discuss merits, we briefly explore the question of the harm to the nonmovant. This is indistinct from the public interest, because "the government's interest *is* the public interest" *Pursuing Am.' Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016) (quoting *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009)). "[T]here is generally no public interest in the perpetuation of unlawful [governmental] action" *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021), and to the contrary a "strong interest in exercising the fundamental political right to vote" *League of Women Voters*, 838 F.3d, *supra,* at 12. See, for the 10th Circuit in which the plaintiff is a state assembly member, *Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016). Whilst it is clear that the plaintiff himself has not been deprived of his own franchise, his electors, citizens of the State of Colorado, have an undeniably negative impact on the public interest, if the plaintiff makes a strong showing on the merits (which we reserve to the end of this order), since "[t]he representative democracy that "We the People" have created" *Barr v. American Assn. of Political Consultants, Inc.*, 140 S. Ct. 2335, 2358 (2020), in which it is a "fundamental" tenet that "the people should choose whom they please to govern them" *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 816 n.24 (2015) (quoting *Powell v. McCormack*, 395 U.S. 486, 547, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)) relies on the universal franchise of citizens being

able to send to their legislatures at regular intervals elected officers whom they believe to be best placed to vindicate their interests. Of course, a person whom is constitutionally unable to hold office is a different proposition entirely, but for reasons we will discuss in the merits prong, we assume at this stage that the impugned resolution is the origin of his bar. We note lastly that the bar is aimed solely at one single person, and is not a general regulatory or legislative provision potentially affecting significant numbers of persons in differing manners – in this respect, there are no third-party harms to granting an injunction.

Last we turn to the most complex prong of the motion in the action at our bar; the merits. The first part of our work – the 'easy part' – is to carry out a plain reading of the alleged section under which the 'joint resolution', which reads "The Congress shall have power to enforce, by appropriate *legislation*, the provisions of this article." U.S. Const. amend. XIV (emphasis added). The trouble with this provision, however, is that "Article I of the United States Constitution requires that before proposed legislation may become a Law, (1) a bill containing its exact text [must be] approved by a majority of the Members of the House of Representatives; (2) the Senate [must] approve precisely the same text; and (3) that text [must be] signed into law by the President," Public Citizen v. U.S. District Court, 486 F.3d 1342, 1343 (D.C. Cir. 2007) (quoting *Clinton v. City of New York*, 524 U.S. 417, 448, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998)) (citation omitted). The nomenclature of "joint resolution" is wholly irrelevant, since "a joint resolution passed by both Houses of Congress and signed by the President (or repassed over the President's veto) is legislation having the same force as any other Act of Congress" *Bowsher v. Synar*, 478 U.S. 714, 769 n.7 (1986) (Stevens, J., concurring in judgment). See

also *National Federation, Fed. Emp. v. U.S.*, 905 F.2d 400, 404 (D.C. Cir. 1990) ("The joint resolution mechanism does not enhance congressional power vis-a-vis the Executive Branch because like all other statutes, it is subject to the President's veto."). This interpretation appears to have been quite consistent throughout our nation's legislative history, at least since the passing for the 14th Amendment, see for instance *Levey v. Stockslager*, 129 U.S. 470 (1889) ("The joint resolution was one of the character mentioned in Section 7, of Article 1, of the Constitution, to which the concurrence of the Senate and House of Representatives was necessary, and which was approved by the President, and took effect only on such approval."). See also *Consumer Energy, Etc. v. Fed. Energy Reg. Comm'n*, 673 F.2d 425 (D.C. Cir. 1982), and authorities cited therein. The joint resolution whose constitutionality is being challenged before this court does not appear to have even been presented to the President, let alone approved by him. We cannot thereby conclude that it has the force of "legislation", nor be employed as such so as to enforce the 14th Amendment – insofar as this is concerned, we are wholly satisfied that the movant makes a strong showing on the merits. We recognise by way of an aside that there may be debate as to whether or not legislation is in fact a necessary medium by way of which effect may be given to section 3 [also known as 2] of the 14th Amendment, see *Cawthorn v. Amalfi*, 35 F.4th 245 (4th Cir. 2022), *Greene v. Raffensperger*, 599 F. Supp. 3d 1283 (N.D. Ga. 2022), *Hansen v. Finchem*, CV-22-0099-AP/EL (Ariz. May 9, 2022). Nevertheless, as neither of the parties appear to raise the issue, nor perceive the need to draw our attention to it at this present juncture, we are reminded by the now-Chief Justice that "[t]he cardinal principle of judicial restraint is if it is not necessary to decide more, it is necessary not to decide more." *Blumenthal v. Trump*, 949

F.3d 14, 19 (D.C. Cir. 2020) (quoting *PDK Labs, Inc. v. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) (internal quotation marks omitted).

Lastly, as we took no regard of this in our above discussion, we address the alleged delay in seeking a preliminary injunction here. We refute that argument absent further material pleaded before us (which the government is free to do of course) for the simple reason that the National Archives and Records Administration ("NARA") record states that the resolution was passed and certified several weeks after the date of the injunction, and in no event before the 1st of September, date of issuance of the previous injunction. The order in that action makes no statement whatsoever as to the factual context of the order. In any event "a delay in filing is not a proper basis [*ipso facto*] for denial of a preliminary injunction" *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011), but merely "relevant in considering one's entitlement to injunctive relief because delay indicates a lack of irreparable harm" *Id*. We have no information at our disposal which indicates what harms, if any, the plaintiff suffered in this time, and we note crucially that plaintiff states that the NARA apparently recently reviewed the facial validity of bar.

A preliminary injunction is of course "an extraordinary remedy that may only be awarded upon a clear showing" *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)), but it is also an interim measure. It is not a merits disposition of the action at our bar and, given the complex legal intricacies with which we are faced – one that several courts are grappling with not without difficulty – we readily accept that our merits-stage disposition may in

fact be at odds with our holding today. We do, however, recognise, that the plaintiff's showing is particularly convincing on the other two prongs, and certainly offers a more-than-plausible claim as to the merits, the only detractions from which have been raised *sua sponte* today.

III. Conclusion and Order

Having regard to the above, the **ORDERS** as follows;

1. The motion for a preliminary injunction is **granted in part**.
2. Namely:
    - The United States is **enjoined** from enforcing as a statute of the United States resolution S.J.R. 1 and enforcing the bar from holding office under the colour thereof.
3. The nonmovant and movant are **notified** of their right to seek dissolution of the injunction before this Court and a new preliminary injunction before the same respectively.

It is so ORDERED,

13th October 2023

/s/Newplayerqwerty

C.J. USDC DDC